

Agenda

Item #9



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members

From: Jonathan Wayne, Executive Director

Date: November 17, 2008

Re: Preliminary Concept for Revising the Express Advocacy Rule

At your October 17, 2008 meeting, you considered whether three examples of campaign mailers sent by the Democratic and Republican parties expressly advocated for the election of the candidates mentioned in the mailers. Following the Commission's 2006 precedents, you determined that the 2008 mailers did not constitute express advocacy. Republican attorney Daniel Billings and Alison Smith, Co-Chair of the Maine Citizens for Clean Elections, suggested that the Commission's 2006 decisions may "moved the [express advocacy] line" and have excluded communications which clearly advocated for the election of candidates. For so-called "issue advocacy" mailers mentioning candidates, the political parties do not file detailed reports of their expenditures and the opposing candidates do not receive matching funds under the Maine Clean Election Act.

As examples of your past decisions, I have attached:

- the final frame of a 30-second television advertisement produced by the Republican Governors Association PAC in support of 2006 Republican gubernatorial nominee, Chandler Woodcock. On September 22, 2006, the Commission determined that the television advertisement was not express advocacy, even though the final frame contained the word "Governor" adjacent to Chandler Woodcock's name.
- two mailers sent by the Maine Democratic Party in support of Anne Rand, the 2006 Democratic nominee for State Representative, District 120. In 2006, Ms. Rand was not an incumbent running for re-election. On October 20, 2006, the Commission voted 2-1 that these two mailers did not expressly advocate for the election of Ms. Rand. The current Commission Chair, Michael P. Friedman, was the dissenting vote.
- one 2006 mailer sent by the Maine Democratic Party in support of Representative Walter Ash. On October 20, 2006, the Commission also found by a vote of 2-1 that the mailer was not express advocacy. Rep. Ash was an incumbent in that election.
- a 2008 mailer sent by the Maine Republican Party in support of Jane Knapp. After taking into consideration the 2006 precedents and the importance of the political

parties' reliance on precedent, you determined on October 17, 2008 that the mailer was not express advocacy.

The Commission staff appreciates the suggestions from Dan Billings and Alison Smith, and agrees with their overall point. We have preliminary drafted a rule amendment that is intended to respond to their comments, but have not had an opportunity to consult with them on this draft. They may have some better formulations to suggest to the Commission or staff. We raise two points for your consideration:

(1) Some campaign finance reporting requirements have been invalidated by the federal courts when the courts viewed them as overbroad or unduly vague. The definition of express advocacy (on which our rule is based) was drafted narrowly in order to avoid problems of overbreadth and vagueness. You may wish to inquire of your counsel whether the proposed rule amendment is sufficiently narrow, or whether it should be amended to avoid constitutional defects.

(2) It could be argued that under the attached rule change, two different standards would apply to mailings by political parties – depending on whether the candidate supported by the party is an incumbent or is not.

Thank you for your consideration of this memorandum.

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
 - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
 - B. "Expressly advocate" means any communication that uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," any communication in which the name or depiction of a clearly identified candidate appears adjacent to or in close proximity to the name of the office sought by the candidate, unless the candidate is the incumbent seeking re-election to that office, or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!".
 - C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.

Commission determined TV
ad not express advocacy
(9/22/06)

CHANDLER
WOODCOCK

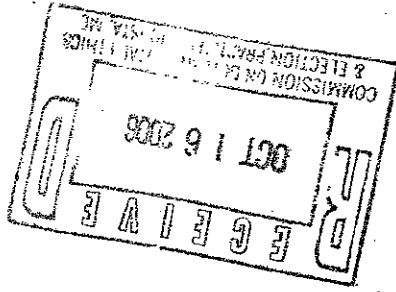
GOVERNOR

VERY VALUABLE SUGGESTIONS
WANT TO PARTICIPATE

207-287-1505

NOT PAID FOR BY CHANDLER
ANY CANDIDATE FOR THE GOV. RACE
FOR PARTICIPATION AT THE ELECTION FOR 2006

Commission
determined mailer
not to be
express advocacy
(10/20/06)



Anne Rand

Anne Rand
State Representative

ANNE RAND

*COOPERATING JOBS
AND LOWER TAXES*

- Expanding property tax relief for Maine home owners
- Targeting tax relief for the middle class and small business, instead of Bush's billionaires.
- Eliminating the tax on business equipment to nurture Maine's small businesses

ANNE RAND

*STRENGTHENING COMMUNITIES
AND PROTECTING FAMILIES*

- Protecting the 400,000 families who rely on the state's public schools
- Protecting the 400,000 families who rely on the state's public schools
- Protecting the 400,000 families who rely on the state's public schools
- Protecting the 400,000 families who rely on the state's public schools

ANNE RAND

State Representative

MAINE VALUES, AN INDEPENDENT VOICE

Paid for by the Maine Democratic Party, 16 Winthrop Street, Augusta, ME 04332
This Communication is not authorized by any candidate or candidate's committee.

DESIGNED, PRINTED & MAILED IN MAINE

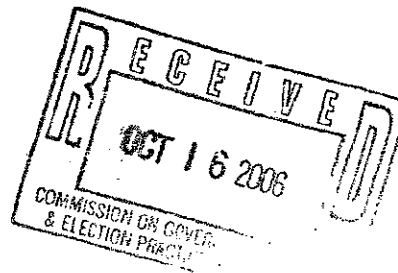
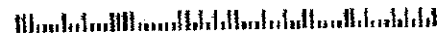


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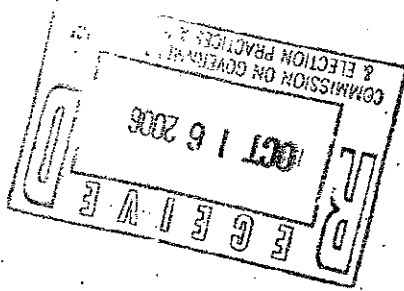
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Permit #504
Augusta, ME

Tray 3 *****AUTO**SCH 5-DIGIT 04101

DOUGLAS EMERY
or CURRENT RESIDENT
11 EXCHANGE ST APT 3G
PORTLAND ME 04101-5086



Not express
advocacy
(10/20/08)



NORWAY	14 MI.
PARIS	15 MI.
DENMARK	23 MI.
NAPLES	23 MI.
SWEDEN	25 MI.
POLAND	27 MI.
MEXICO	37 MI.
CHINA	94 MI.
PERU	46 MI.

Anne Rand

State Representative

A new direction for Maine...



Anne Rand

is working to build a stronger future for Maine and is standing up for hard-working Mainers.

That is why **Anne Rand** is committed to:

- ☒ Growing good-paying jobs and building a stronger Maine economy.
- ☒ Expanding property tax relief for Mainers.
- ☒ Working to make health care affordable for Maine families.
- ☒ Dedicated to improving Maine schools and creating new opportunities.
- ☒ Practicing fiscal responsibility here in Maine - and demand it from Washington.

Non-profit Org.
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Augusta, ME

Tray 4 *****AUTO**3-DIGIT 041
BENJAMIN CHIPMAN
or CURRENT RESIDENT
PO BOX 1254
PORTLAND ME 04104-1254

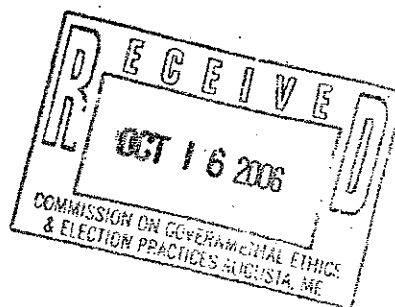


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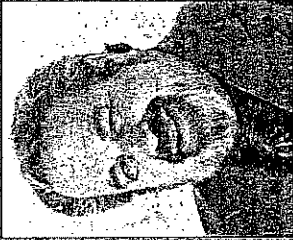


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*Paid for by the Maine Democratic Party, 16 Winthrop Street, Augusta, ME 04332
This Communication is not authorized by any candidate or candidate's committee.*



Not express
advocacy
(10/20/036)



As leader and a voice for our community,
Walter Ash is working to build a stronger
future for our state. Walter is fighting against
the failed Bush policies that have left Mainers
behind and he is standing up for hardworking
Mainers.

State Representative
Walter Ash

Maine values an independent voice.

HELLO
my name is

REPRESENTATIVE
WALTER ASH

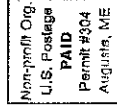
State Representative WALTER ASH

MAINE VALUES, AN INDEPENDENT VOICE

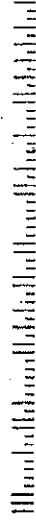
Paid for by the Maine Democratic Party, 16 Winthrop Street, Augusta, ME 04332
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PAID 11 11 11



Tray 2 *****AUTO**5-DIGIT 04915
LORING GILES
or CURRENT RESIDENT
15 TOZIER ST
BELFAST ME 04915-6037



WALTER ASH

GOOD-PAYING JOBS
AND LOWER TAXES

- Expanding property tax relief for Maine home owners
- Targeting tax relief for the middle class and small business, instead of Bush's billionaires
- Eliminating the tax on business equipment to nurture Maine's small businesses

WALTER ASH

STRENGTHENING COMMUNITIES
AND PROTECTING FAMILIES

- Increasing jail sentences for sexual predators and providing real community protections
- Protecting our environment by eliminating lead and mercury
- Investing in higher education to help prepare Maine workers for the jobs of tomorrow



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the October 20, 2006 Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair (Pro Tempore) Hon. Andrew Ketterer; Hon. Vinton E. Cassidy; Hon. Michael P. Friedman. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 A.M., Chair (Pro Tempore) Andrew Ketterer convened the meeting. The Commission considered the following items:

Agenda Item #1 – Ratification of Minutes of the September 22, 2006 Meeting

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission adopt the minutes as printed.

Ms. Gardiner said that the minutes should include a description of the discussion and motion that occurred during the transcribed portion of the meeting.

Mr. Wayne asked if the staff should amend the minutes and present them to the Commission at its next meeting.

Mr. Ketterer asked if the ratification of the minutes was necessary for an appeal to go forward. Ms. Gardiner replied that it was not.

Mr. Cassidy moved, Mr. Friedman seconded, and the Commission voted unanimously (3-0) to table Agenda Item #1.

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE
WEBSITE: WWW.MAINE.GOV/ETHICS

PHONE: (207) 287-4179

FAX: (207) 287-6775

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #13 -- Request for Matching Funds/Benjamin Meiklejohn

Jon Bartholomew said that there was no other reasonable interpretation of the mailer sent by the Democratic Party than as advocacy for the election of Anne Rand.

Mr. Ketterer asked Mr. Bartholomew what he would recommend. Mr. Bartholomew said that the Commission should consider the mailers to be express advocacy and trigger matching funds.

Michael Saxl said that the Commission decided that some of the advertisements aired in the gubernatorial election were not express advocacy. Mr. Saxl said that the party designed its mailers based on that decision.

Benjamin Meiklejohn joined the meeting by telephone.

Mr. Meiklejohn said that the mailer included the words "Anne Rand, State Representative." Mr. Meiklejohn said that considering that Anne Rand was not at the time a state representative, the mailing must have advocated for her election. Mr. Meiklejohn said that the mailer fit the "other language" provision of the statute.

Mr. Wayne said that the staff recommendation was based on the Commission's ruling on the Republican Governors Association ads. Mr. Wayne said that it was hard to consider the Democratic Party mailings express advocacy when the Commission determined that the RGA ads were not.

Mr. Meiklejohn said that based on the Commission's decisions, the parties could put up signs that do not contain express advocacy without triggering matching funds.

Mr. Ketterer said that Mr. Meiklejohn's comments were well received and there may be statute changes in the future.

Mr. Meiklejohn said that his matter was a separate issue from the ads in the gubernatorial race.

Mr. Wayne said that the Republican Governors Association ad displayed Chandler Woodcock's name and office sought at the very end. Mr. Wayne said that the Commission determined that the other language in the ad related to issues. Mr. Wayne said that a sign or bumper sticker with just the name of a candidate and the office sought could be considered to be express advocacy because it would not contain any other language.

Ms. Gardiner said that the Commission's September 22 decision should not be taken to mean that mentioning the name of the office does not make a communication express advocacy. Ms. Gardiner said that the ads were considered in context.

Mr. Cassidy asked Mr. Wayne how he determined the staff recommendation. Mr. Wayne said that both of the mailers contained enough issue content so that they were not express advocacy.

Mr. Cassidy asked if a lawn sign stating only "Anne Rand, Representative" would be considered express advocacy. Mr. Wayne said that it would be express advocacy because there would be no discussion of issues. Mr. Wayne said that the Commission's rules have specific examples of express advocacy, including signs and bumper stickers.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff's recommendation and pay no matching funds.

Mr. Friedman said that the mailers contained express advocacy. Mr. Friedman said that there was little discussion of issues in the mailers and they should trigger matching funds.

Mr. Cassidy said that the mailers were similar to the ads discussed at the September 22 meeting.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #14 – Request for Matching Funds/W. Bruce MacDonald

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that unlike the mailers discussed in the previous agenda item, the materials seemed to be issue-oriented. Mr. Friedman said that they did not include the name of the office sought by the candidate.

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #15 – Request for Matching Funds/Jayne Crosby Giles

Jayne Crosby Giles said that she received both campaign and non-campaign mailers relating to Walter Ash on the same day. Ms. Crosby Giles said that the mailers contained overlapping themes, causing confusion among voters as to which of the mailings were advocating for Walter Ash's election.

Mr. Friedman asked if it would have made a difference if Ms. Crosby Giles had not received the mailings all at the same time. Ms. Crosby Giles said that receiving them at the same time resulted in the mailings being a different issue from her previous complaint and clearly express advocacy.

Jon Bartholomew said that he disagreed with some of the Commission's previous decisions and supported Ms. Crosby Giles' complaint. Mr. Bartholomew said that the Commission should consider the context of the mailings and not just look for the "magic words" to determine express advocacy.

Dan Billings said that Patricia LaMarche's appeal of the Commission's decision on the Republican Governors Association ads was currently before the court. Mr. Billings said that if

the court were to strike down the Commission's earlier decision, it should revisit the items discussed at the present meeting.

Mr. Ketterer asked Mr. Billings for his opinion on the issue of campaign and non-campaign mailings arriving at the same time. Mr. Billings said that it was likely a coincidence and not a coordinated act.

Mr. Cassidy said that he didn't see a connection between the mailings. Mr. Cassidy said that if they were coordinated, they probably wouldn't have been mailed at the same time.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that the mailing was express advocacy because despite some mention of issues, the ultimate purpose of the mailing was to advocate for Walter Ash's election.

Mr. Ketterer said that he agreed with Mr. Cassidy but the Commission should consider each case individually and in context.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #16 – Request for Matching Funds/John N. Frary

Mr. Wayne said that John Frary, chair of the Franklin County Republicans, brought the request on behalf of Republican candidate Lance Harvell. Mr. Wayne said that the literature was handed out at the University of Maine at Farmington. Mr. Wayne said that the literature contained Mr. Harvell's responses to a survey from the Maine Economic Research Institute. Mr. Wayne said that it was not clear whether the literature was intended to oppose Mr. Harvell.

Not express
advocacy
(10/17/08)

Maine Families Deserve a Representative Who Will Fight for Them

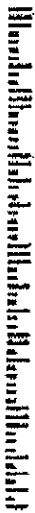


**Growing Our Economy.
Keeping Taxes Low.
Lowering Energy Costs.**

*Call Jane Knapp at 839-3880 and thank
her for fighting for Maine families!*

Paid for and authorized by the Maine Republican Party, Phil Risp, Treasurer.

Maine Republican Party
9 Higgins Street
Augusta, ME 04330



38524

Daniel J. Levesneur
117 McElwain Rd
Gorham ME 04038-1849

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JANE KNAPP

FIGHTING FOR YOUR FAMILY



Growing Our Economy.

Maine families are worried about the state of our economy. Jane Knapp understands the economic anxiety, and will work to stimulate the economy, create jobs, and expand opportunity.



Keeping Taxes Low.

Maine families already pay too much in taxes. Jane Knapp will fight to lower taxes for working families so they can keep more of what they make. Maine families can make better decisions about how to spend their money than government bureaucrats.



Lowering Energy Costs.

Jane Knapp knows Maine families are struggling to pay for the high cost of gas and heating oil. That is why she will fight for an energy plan that will lower costs and allow our natural resources to power Maine's future.

**A Growing Economy. Lower Taxes.
Energy Independence.**

**JANE KNAPP
LEADERSHIP YOU CAN TRUST**

*Call Jane Knapp at 839-3880 and thank
her for fighting for Maine's families.*

